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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY,
TOBACCO WORKERS' INTERNATIONAL UNION, AND
LOCAL 182 OF TOBACCO WORKERS'
INTERNATIONAL UNION,
Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE,
EDMUND PAGE, JAMES RANDOLPH
AND PERCY TAYLOR,
Respondents.

AMERICAN BRANDS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members or their constituents are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the Court of Appeals for the Fourth Circuit has erred in concluding that Congress intended that the immunity from Title VII liability afforded bona fide seniority systems by Section 703(h) of Title VII should extend

[1] Their consents have been filed with the Clerk of the Court.

only to seniority practices instituted before the Act's effective date.[2]

At issue in this case, as in *Pullman-Standard v. Swint*, U.S. Nos. 80-1190 and 80-1193, is the continued viability of the protection Congress extended to bona fide seniority systems in § 703(h). The Fourth Circuit in *Patterson*[3] and the Fifth Circuit in *Pullman-Standard*[4] have advanced interpretations of that section which are at odds with this Court's holding in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and which would improperly restrict the protections of § 703(h). Accordingly, because of the potentially enormous impact upon seniority systems and the rights and benefits accrued thereunder, this Court's disposition of those cases is of vital concern to the nation's employers, employees, and unions.

STATEMENT OF THE CASE

Plaintiffs in this employment discrimination case allege that the operation of a lines of progression

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[2] Because of its interest in issues involving interpretation of Section 703(h) of Title VII, EEAC has filed briefs as Amicus Curiae with this Court in *Pullman-Standard v. Swint*, Nos. 80-1190 and 80-1193; *California Brewers Association v. Bryant*, 444 U.S. 598 (1980); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines v. Evans*, 431 U.S. 553 (1977); and *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

[3] *Patterson v. American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980) (*en banc*).

[4] *Swint v. Pullman Standard*, 624 F.2d 525 (5th Cir. 1980).

promotional policy instituted in 1968 violates Title VII.[5]

In the *en banc* opinion before this Court, the circuit court held that Congress intended the protections of § 703(h) to apply only to those systems in existence on the effective date of Title VII and to routine post-Act applications of such systems. Because the lines of progression policy was adopted after the effective date of Title VII, § 703(h) was found to have no application, whether or not the policy was considered a seniority system. As a result, the Fourth Circuit held that the discriminatory effect of that policy was properly evaluated by the district court under the disparate impact test of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In other words, the Fourth Circuit has concluded that it was the intent of Congress to immunize from Title VII liability only those seniority systems in existence prior to the Act's effective date and to require that the legality of pre-Act and post-Act systems be evaluated pursuant to widely, and often crucially, differing legal standards.

SUMMARY OF ARGUMENT

The Fourth Circuit's holding would implicitly repeal § 703(h) for all post-Act seniority systems and make the validity of such systems depend upon

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[5] There is a dispute regarding whether the lines of progression policy was implemented in 1968 or at an earlier time, prior to the effective date of Title VII. Compare *Patterson*, 634 F.2d 744, 757-766, dissent of Judge Widener, *with* the majority's reply, *Id.* at 749 and n.4. For purposes of analysis of the majority's holding, however, the Amicus assumes that the lines of progression policy was implemented in 1968.

whether or not they perpetuated the effects of past employment practices. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Moreover, the court's opinion would effectively discourage employers and unions from changing seniority systems. That standard and result are directly contrary to this Court's holdings and the intent of Congress.

As this Court has acknowledged, "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation." *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 766 (1976). In § 703(h) of Title VII, Congress recognized the importance of seniority systems, as well as the process of independent collective bargaining in which they are negotiated, by providing that unless intentional discrimination is involved, the operation of such systems "shall not be an unlawful employment practice." It is apparent from this Court's decision in *California Brewers Association v. Bryant*, 444 U.S. 598 (1980), that the immunity from Title VII liability extended by § 703(h) is prospective, and protects any neutral, bona fide seniority system, whenever adopted.

Congress recognized that neutral bona fide seniority policies could have a "disparate impact" upon more recently hired minority group members, but determined that the protection of bona fide seniority systems was of overriding importance. As its resolution of competing interests, Congress determined that "[p]ost-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* [424 U.S. 747 (1976)] . . .

without attacking the legality of the seniority system as applied to them" (emphasis added). *Teamsters v. United States*, 431 U.S. at 347.

The circuit court's reading of § 703(h) contradicts the unambiguous language of the section, which unqualifiedly applies to all bona fide systems. Moreover, the legislative history of § 703(h) indicates that Congress intended that Title VII would not result in setting aside, or making illegal in the future, neutral, bona fide seniority systems. Statements of the sponsors of the bill were inserted into the record to respond to objections of the opponents to Title VII that bona fide seniority systems would be set aside. It is unthinkable that legislative statements intended to protect seniority systems could be construed as evidence of a Congressional intent to prohibit upon enactment precisely the types of pre-Act systems the bill's opponents vigorously sought to protect. Indeed, because Title VII would not have passed without support of legislators who resisted federal encroachment upon traditional management prerogatives and union freedoms (*United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979)), the only logical conclusion is that post-Act systems were intended to be given the same protections at pre-Act systems.

Moreover, under the Fourth Circuit's interpretation, § 703(h) would no longer protect seniority systems modified by collective bargaining, conciliation agreements or consent decrees, even if the changes were intended to soften the effects of past employment practices. Although voluntary change in employment practices is the preferred means for carrying out the purposes of Title VII, *Alexander v. Gardner-Denver*, 415 U.S. 36, 44 (1974), the circuit court's approach

would penalize and, therefore, discourage such voluntary attempts to ameliorate the application of past systems. Thus, the opinion of the court below flies in the face of the statutory language, is at odds with this Court's decisions and poses a significant threat to the proper administration of the Federal labor and antidiscrimination laws.

ARGUMENT

THE FOURTH CIRCUIT'S CONCLUSION THAT SECTION 703(h) APPLIES ONLY TO PRE-ACT SENIORITY SYSTEMS IS DIRECTLY CONTRARY TO THE STATUTORY LANGUAGE, THE LEGISLATIVE HISTORY AND THIS COURT'S HOLDINGS

A. The Language Of Section 703(h) Is Unambiguously Applicable To All Bona Fide Seniority Systems, And This Court Has Emphasized That Prospective Application Of That Section Is Required By The Nation's Labor Policy

The Court has long recognized that differing industrial circumstances and bargaining goals have given rise to a wide variety of seniority systems and components of those systems. Indeed:

> It is the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static.
>
> * * * *
>
> There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle

> of seniority in the interest of the ultimate aims of collective bargaining. *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 525-26 (1949).

Title VII, of course, was modeled in large part on this pre-existing national labor policy. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 769 (1976). The Fourth Circuit's construction of § 703(h) as applying only to those particular seniority systems in place as of the effective date of Title VII, however, is antithetical to this labor policy and at odds with the intent of Congress when it passed Title VII.

As this Court has observed, "seniority systems are afforded special treatment under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). In unambiguous language, applicable to all bona fide seniority systems,* § 703(h) of Title VII provides, in pertinent part:

> Notwithstanding any other provision of this subchapter, *it shall not be* an unlawful employment

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*The "starting point" in statutory construction is, of course, the language of the statute itself. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Furthermore, the "literal or usual meaning" of a statute's words should be accepted as controlling unless to do so would "lead to absurd results" or "thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978).

As noted recently by the District of Columbia Circuit, the language of § 703(h) "suggests Congress' simple, but unequivocal, intent to preserve the lawfulness of bona fide seniority systems *even after* the passage of Title VII." *United States of America and Equal Employment Opportunity Commission v. Trucking Management, Inc.*, No. 79-2102 (D.C. Cir., August 14, 1981), slip op. at 16 (emphasis in original).

> practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system, . . . *provided that such differences are not the result of an intention to discriminate because of race.* (Emphasis added.)

It is well settled that § 703(h) is a "definitional provision" delineating which employment practices are illegal and thereby prohibited and which are not."[7] Nothing in the statutory language suggests that the immunity extended thereby is to be conditioned upon the date a seniority system is implemented. On the contrary, the *only* prerequisite to the statute's protection is the absence of discriminatory intent in the negotiation or application of the seniority rule.[8]

Not only does the language of § 703(h) embrace all bona fide seniority systems, it is also clear from this Court's decisions that the section is to be applied to systems negotiated or changed after the effective date of the Act. In *Franks*, this Court discussed the im-

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[7] *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 758 (1976). *Accord, Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 346-47 *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 559 (1977).

[8] As the dissent below pointed out, the majority opinion has transformed the unqualified language of § 703(h) into a "grandfather" clause. 634 F.2d at 757 n.1. We concur with the dissent and the arguments of the appellants that Congress undoubtedly knows how to write a "grandfather" clause if it wishes. For example, Congress could have drafted § 703(h) by adding either the word "existing" or "established" to modify the term seniority system. It is inappropriate to read such qualifying language into an unambiguous statutory provision.

portance of seniority systems as being a part of an evolutionary process that looks to future changes and developments as a necessary condition for its continued viability. As the Court stated: "Seniority systems and the entitlements conferred by credits earned thereunder are of vast and *increasing* importance in the economic employment system of this nation. S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 104-05 (1960). Seniority principles are *increasingly* used to allocate scarce benefits among competing employees . . . and to compute noncompetitive benefits earned under the contract of employment." 424 U.S. at 766, emphasis added.[9]

In this same regard, the Court in *Teamsters* stressed that "Section 703(h) on its face immunizes *all* bona fide seniority systems" (431 U.S. at 348 n. 30, emphasis added), and later added that:

> there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant wide seniority systems. *Then, as now* [1977], seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job,

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[9] *See* Elkouri & Elkouri, *How Arbitration Works*, 3d Edition 555 (1973) ("Modification of prior seniority provisions in subsequent Agreements is a fairly common feature of collective bargaining," quoting *Ford Motor Co.*, 23 LA 296, 297 (1954)). Indeed, "consideration of seniority looms so importantly that it has been said that 'one of the principle purposes for entering into a collective bargaining agreement is usually to secure for the employees the prized right of seniority in case of layoff and promotion.'" Elkouri and Elkouri at 555 (citation omitted).

> or in a line of progression. 431 U.S. at 354 n. 41 (emphasis added).

In no sense did this Court suggest that the statute is limited in the manner adopted by the Fourth Circuit; rather, in a very real sense, the Court indicated the ongoing and developing nature of seniority systems that Congress sought to preserve.

Similarly, this Court's opinion in *California Brewers*[10] repeatedly reflects Congressional appreciation of the evolutionary nature of collective bargaining and of the inevitable diversity of seniority systems that have been and *will be* developed by parties to collective bargaining in diverse circumstances:

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *United Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480. It does not behoove a court to second-guess either that process or its products. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 90 S. Ct. 821, 25 L.Ed.2d 146. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048; *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 69

[10] *California Brewers Association v. Bryant*, 444 U.S. 598 (1980).

S. Ct. 1287, 93 L.Ed. 1513. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703(h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U.S., at 355, n.41, 97 S. Ct., at 1865. 444 U.S. at 608.[11]

While cautioning that § 703(h) would not immunize rules that "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system," [12] this Court emphasized in *California Brewers* that "[s]ignificant freedom *must* be afforded employers and unions to create differing seniority systems." [13] This language, written

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[11] Congressional deference to the rights secured by seniority systems has been recognized by the Court in a variety of Title VII contexts. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (requirement of § 701(j) of Title VII that employers and unions reasonably accommodate employees' religious practices, absent undue hardship, does not require abrogation of other employees' collectively-bargained seniority rights); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (a bona fide seniority system that perpetuates the effects the employer's past discrimination is nonetheless protected by § 703(h) of Title VII); *California Brewers Association v. Bryant*, 444 U.S. 598 (a seniority system's "ancillary rules" do not fall outside the protections of § 703(h) simply because they do not "operate on the basis of some factor involving the passage of time.")

[12] 444 U.S. at 608.

[13] *Id.*, emphasis supplied. As has been stressed repeatedly, Congress did not want the courts to "second guess" the parties to a collective agreement, but insisted instead that seniority rights vested under any bona fide seniority system be respected, even if the system perpetuated the effects of

almost 15 years *after* the effective date of Title VII, demonstrates that the Court considers § 703(h) to be applicable, *now and in the future*, to the "differing seniortiy systems" that parties to collective bargaining can be expected to create.[14]

The predictable consequences of the Fourth Circuit's holding are at odds with the intent of Congress to encourage the continued resolution of seniority issues by the bargaining process. Section 703(h) effectively would be written out of the statute for parties who negotiate new seniority systems. All new or modified seniority systems would be judged by the *Griggs* standard—a result manifestly at odds with *Teamsters*. See below, pp. 15-18. Consequently, to avoid losing the protections of § 703(h), employers and unions would have a strong incentive to keep the pre-Act systems intact without making necessary or desirable adjustments. Collective bargaining would be stultified in a manner contrary to the teachings of the *California Brewers* decision.

The disruptive potential of the decision below is better understood when one considers a few of the

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prior discrimination. *See, California Brewers Ass'n v. Bryant*, 444 U.S. at 608; *Teamsters*, 431 U.S. at 350-51. *And see Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); *Steelworkers v. Weber*, 443 U.S. 193, 205-206 (1979); and *Texas Dept. of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1096 (1981) (Title VII "was not intended to 'diminish traditional management prerogatives.' ").

[14] Inexplicably, the Fourth Circuit failed even to mention the *California Brewers* decision, even though it was decided almost one year before the Fourth Circuit's decision.

seniority issues that must be resolved by the bargaining process, each of which can be extremely important for the relations between the employer and employees and between the employees themselves. As pointed out in Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 118 (1960), initial contract language dealing with seniority may give rise to administrative or interpretive problems that must be clarified, modified or changed over time. Questions which arise include: (1) whether periods of absence from work count toward total service (*Id.* at 118-19); (2) what methods should be used to determine the priority among employees with the same seniority date (*Id.*, at 119); (3) what time credit should be given a probationary employee for satisfying his probationary period (*Id.* at 123); (4) on what bases may seniority be lost (*Id.* at 125); (5) whether and to what extent to protect recall and other rights after long or indefinite periods of unemployment (*Id.* at 127); (6) how to adjust seniority for workforces merged during the consolidation of two or more plants of the same or separate companies (*Id.* at 130-31); (7) how to deal with the employment rights of employees who have never worked in the bargaining unit as they relate to unit employees (*Id.* at 132); (8) how to determine the rights of an employee who moves from a bargaining to nonbargaining unit (*Id.* at 132); (9) how to preserve the seniority rights of supervisory personnel who come back to or initially enter the bargaining or seniority unit (*Id.* at 132-33); or (10) how to establish the rights of an employee who moves from one seniority unit to another within the same plant (*Id.* at 134). The peaceful resolution of such basic employment relations questions is the cornerstone of the

country's labor relations policy. The decision below, however, would undercut this policy and create a disincentive to the creative ordering of the relative rights of employees.

In addition, it would be more difficult for parties to Title VII or other employment discrimination litigation to settle cases, because any seniority modification made as part of the settlement would pose a definite risk that the employer's entire seniority system would lose its statutory protection. See footnote 22, below. The Fourth Circuit's opinion thus would undermine one of the most important policies underlying Title VII. In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims. Indeed, "[c]ooperation and voluntary compliance were selected as the *preferred* means for achieving this goal." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Yet, if § 703(h) protection does not extend to new agreements, collective bargaining participants and litigants will have less incentive to negotiate arrangements which, in many cases, could greatly ameliorate the disparate effects of past employment practices, legal or otherwise.[15]

B. There Is No Support In This Court's Decisions Or In The Legislative History For Applying A Different Legal Standard To Post-Act Than To Pre-Act Seniority Systems

Aside from its predictable "chilling effect" on the negotiation and modification of seniority agreements, the circuit court's bifurcated approach to seniority

[15] The negative effect of the decision below on affirmative action is fully set out in the petitioners' brief.

under § 703(h) would lead to non-uniform administrative and judicial application of that section. Thus, as the Fourth Circuit interprets § 703(h), the same bona fide seniority system, neutral on its face and as applied, would be lawful *in spite of* its perpetuation of prior discrimination if it were implemented before July 2, 1965, but it would be held unlawful *because of* such perpetuation if implemented after the effective date of the Act. Indeed, if the Fourth Circuit's view were correct, the neutral seniority systems in *Franks*, *Teamsters*, *Evans* and *California Brewers* would have been unlawful had they been adopted after 1965 if they perpetuated the effects of pre-Act discrimination. Also, the same employer could have similar pre- and post-Act systems in the same plant for different bargaining units which would be judged under different legal standards. This inconsistent result would hinge upon the time of implementation of the system and not upon any characteristics of the neutral system itself. Not only would this anomaly be unprecedented labor policy, as we now show it would render ineffective this Court's prior decisions and nullify the intent of the Congress that enacted Title VII.

Although this Court has analyzed the applicability of § 703(h) in cases involving seniority systems' perpetuation of both pre-Act and post-Act discrimination,[16] the Court never has suggested, as the Fourth Circuit would have it, that post-Act systems should be

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[16] *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324; and *United Air Lines v. Evans*, 431 U.S. 553; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63.

judged under the *Griggs* disparate impact test, or that the Court's holding depended upon the pre-Act implementation of the seniority systems at issue.

Rather, from *Franks*, *Teamsters*, *Evans* and *Hardison*, it is evident that the Court views Congress's mandate as requiring that analysis of the legal effect of a seniority system proceed differently than in traditional "disparate impact" cases. For as stated in *Teamsters*, "[w]ere it not for § 703(h) the seniority system in this case would seem to fall under the *Griggs* rationale." [17] While the *Griggs* (disparate impact) approach would require that an employment practice fair in form but discriminatory in operation must be justified by business necessity to avoid Title VII liability [*Griggs v. Duke Power Company*, 401 U.S. at 429-32], "§ 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 82, n.13. "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Id.* at 82.

Moreover, the remedial purposes of Title VII can be served fully without changing or setting aside bona fide, neutral seniority systems. As the Court emphasized in *Teamsters*, "Post-Act discriminatees . . . may obtain full 'make whole' relief, including retroactive seniority under *Franks v. Bowman* . . .

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[17] *Teamsters*, 431 U.S. at 349.

without attacking the legality of the seniority system as applied to them." 431 U.S. at 347. The fact that the relief available to discriminatees would not be enlarged by holding unlawful a seniority system that perpetuated the effects of the employer's post-Act discrimination is, as the Court has stated, "simply an additional reason not to hold the seniority system unlawful." *Teamsters*, 431 U.S. at 348, n.30. For the numerous reasons stated above, there is no basis for the Fourth Circuit's holding that effectively reads out of § 703(h) the intentional discrimination language and substitutes the *Griggs* standard.

Because the language of the § 703(h) is clear and unqualified in defining the protections that it affords all seniority systems, it is unnecessary to look to the legislative history which, as this Court has stated, is unusual in light of the "absence of the usual legislative materials" surrounding its adoption. See *Franks v. Bowman*, 424 U.S. at 761. There is nothing in the history, however, that would prevent the application of § 703(h) to post-Act seniority systems. As noted in this Court's discussions in *Teamsters* and *Franks*, the main thrust of the legislative materials was to assure critics of the legislation that it would not disrupt the various types of existing seniority systems, or the rights of employees vested under those systems, which had accrued prior to the enactment of Title VII.

Specifically, the legislative record contains a Justice Department statement and a series of Dirksen-Clark questions and answers to the effect that the statute would not affect bona fide neutral seniority systems

and would not require an employer to change existing seniority lists even though the negative impact of such systems on minority employees was clearly recognized by Congress. *Franks*, 424 U.S. at 759-60 & nn.15 and 16. As set forth fully in the petitioners' brief, the legislative history demonstrates that these statements designed to protect existing seniority systems were not in any way intended to be construed as limitations that somehow imply that post-Act systems were to be judged by a different legal standard.

To the contrary, because the legislative statements were designed to satisfy objections by opponents of Title VII that bona fide seniority systems could be attacked if the proposed legislation were enacted, there is neither logic nor common sense in the Fourth Circuit's reading of such statements as evidence of Congressional intent to invalidate post-Act seniority systems. It is unthinkable that the opponents of Title VII would have supported a bill that would prohibit upon enactment precisely the types of pre-Act seniority systems they so assiduously sought to protect. Rather, the contrary Congressional intent has been recognized by this Court:

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." *United Steelworkers v. Weber*, 443 U.S. at 206.

Thus, the history of § 703(h) specifically limits the reach of the statute as it pertains to neutral, bona

fide seniority systems. There is not one word evidencing an intent to invalidate otherwise neutral post-Act systems, or to restrict severely managerial prerogatives in the manning suggested by the Fourth Circuit.[18]

In sum, consigning post-Act seniority systems to the *Griggs* analysis would, with regard to such systems, revive the discredited *pre-Teamsters* principles that discriminatory intent may be inferred, and a Title VII violation found, from a seniority system's perpetuation of the effects of prior discrimination. Because there is no expression of Congressional intent to apply widely disparate legal analyses to post-Act and pre-Act seniority systems, there is no reason to interpret § 703(h) in a manner that causes the section to "self-destruct," and which is, moreover, inharmonious with Title VII's basic goals. It is apparent from the inconsistent and anomalous results that would flow from application of the Fourth Circuit's holding, that Congress did *not* intend that § 703(h) should apply only to pre-Act systems.

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[18] The Circuit Court's opinion is open-ended and could be construed to invalidate an entire seniority system if a component of that system were modified after the effective date of the Act. Take, for example, an employer whose "existing" system was modified on July 3, 1965, to include a probation component of the type approved by the Court in *California Brewers*. If the remaining basic components of the seniority system were then to be judged by the *Griggs* standard because of the post-Act modification, the legislative history approving existing systems would be rendered meaningless. Moreover, as the *Brewers* decision makes clear, our construction of § 703(h) would still permit the proper application of the *Griggs* standard to "practices, procedures and tests" without "swallowing up" Title VII's otherwise broad protections. 444 U.S. at 608-09.

CONCLUSION

Congress intended § 703(h) to immunize from Title VII liability the operation of bona fide seniority systems, even when those systems tend to perpetuate the effects of prior discrimination. Nonetheless, Title VII's remedial provisions permit, and § 703(h) does not bar, an award of retroactive seniority to remedy timely-charged post-Act discrimination. Victims of such discrimination may thus be "made whole" without judicial invalidation or modification of neutral seniority systems which, in their application, have perpetuated the discriminatory effects. Within this context, it is clear that the Fourth Circuit's attempt to limit § 703(h)'s applicability to pre-Act systems not only is unsupported by legislative history and this Court's holdings, it would undermine important tenets of the national labor policy reflected in Title VII as a whole. This Court should, therefore, reject the Fourth Circuit's reading of § 703(h) and make it clear that any seniority system, whenever negotiated, is protected by that section unless it is demonstrated that intent to discriminate entered into the system's negotiation or maintenance.

Respectfully submitted,

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